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individually, and on behalf of all others  
similarly situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PEDRO ACERO, individually, and on behalf  
of all others similarly situated,

Plaintiff,

vs.

STATE COMPENSATION INSURANCE  
FUND,

Defendant.

Case No.

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF**

CLASS ACTION AND  
FLSA COLLECTIVE ACTION

1. FLSA Overtime Pay
2. California Unfair Competition Law
3. California Labor Code §§ 201-203

**JURY TRIAL DEMANDED**

PEDRO ACERO ("Plaintiff"), on behalf of himself and acting for the interests of other  
current and former employees, alleges as follows:

**INTRODUCTION**

1. This is a Fair Labor Standards Act (FLSA) collective action for failure to pay  
overtime wages required under the FLSA, with respect to off-the-clock work, as more fully set  
forth below.

2. This is also a class action by and on behalf of employees and former employees for,  
among other things, (a) violation of their federal rights to overtime pay, including being made to  
work off-the-clock, causing them to be paid nothing at all for substantial amounts of work; and (b)

1 violation of their state law rights to timely payment of all wages due at time of discharge or  
2 resignation. This class action also seeks relief for the overtime compensation violations under the  
3 California Unfair Competition Law, California Business and Professions Code sections 17200 *et*  
4 *seq.*

5 3. The allegations in this Complaint are made without any admission that, as to any  
6 particular allegation, Plaintiff bears the burden of pleading, proof, or persuasion. All rights to plead  
7 in the alternative are reserved.

#### 8 **JURISDICTION AND VENUE**

9 4. This Court has original federal question jurisdiction under 28 U.S.C. section 1331  
10 because this case is brought, in part, under the Fair Labor Standards Act, 29 U.S.C. sections 201, *et*  
11 *seq.* This Court has supplemental jurisdiction over the state law claims. The state law claims are  
12 so related to the claims in the action within such original jurisdiction that they form part of the  
13 same case or controversy under Article III of the United States Constitution.

14 5. Venue is proper in this district because a substantial part of the events and omissions  
15 giving rise to the claims occurred in this district, including Defendant's operations and primary  
16 place of business in the County of San Francisco (California Insurance Code section 11781).  
17 Venue is proper in this district also because there is personal jurisdiction in this district over  
18 Defendant. At all relevant times, Defendant has conducted substantial, continuous and systematic  
19 commercial activities in this district.

#### 20 **PARTIES**

21 6. Defendant State Compensation Insurance Fund is an entity established by the  
22 California Legislature under its "plenary power, unlimited by any provision of this Constitution, to  
23 create, and enforce a complete system of workers' compensation, by appropriate legislation. . . ."  
24 (Cal. Const. Art. 14 § 4.) Division 2, Part 3, Chapter 4 of the California Insurance Code,  
25 commencing with Insurance Code section 11770, establishes Defendant State Compensation  
26 Insurance Fund and provides for its operation and funding, and has its principal place of business in  
27 the County of San Francisco pursuant to Insurance Code section 11781. It is not a municipal  
28 corporation, other corporation, or an entity exercising a governmental function. Rather, it is a non-

1 profit public enterprise fund that operates like a mutual insurance carrier and engages in proprietary  
2 activities. At all pertinent times, it has employed Class Members in positions of loss control  
3 representative, loss control consultant, marketing representative, senior loss control representative,  
4 senior loss control consultant and senior marketing representative within the State of California.

5 7. Plaintiff PEDRO ACERO is a Class Member and a former employee of Defendant  
6 who was, from prior to 2010 until on or about April 25, 2014, employed by Defendant as a loss  
7 control consultant and loss control representative based in Oxnard and then subsequently in  
8 Camarillo, California. His final rate of pay was approximately \$31.17 per hour, with a  
9 corresponding premium hourly rate for overtime of \$46.75.

10 8. Plaintiff is filing herewith an FLSA Consent Form as required by 29 U.S.C. sections  
11 216(b) and 256, which is incorporated by reference as if fully set forth.

12 9. The California law claims for relief are brought on behalf of the class of all persons  
13 similarly situated, who are further specified in the class definition below. This action is brought  
14 and may properly be maintained as a class action pursuant to Fed. Rule of Civ. Proced. 23(a) and  
15 23(b)(3).

16 10. The proposed class, sometimes referred to herein as the "Class Members," or the  
17 "Class," is presently defined as follows:

18 **Rule 23 Class Definition**

19 All persons who, on or after four years before the filing of this Action have been,  
20 are, or in the future will be, employed in California by Defendant in positions of  
21 loss control representative, loss control consultant, marketing representative, senior  
22 loss control representative, senior loss control consultant or senior marketing  
23 representative.

24 11. There is a well-defined community of interest in the litigation and the proposed  
25 Class is easily ascertainable, as alleged more specifically below.

26 12. **Numerosity:** The Class is so numerous that individual joinder of all Class Members  
27 is impracticable. Plaintiff estimate the Class consists of several hundred people.

1           13.     **Ascertainability:** The Class Members are specific people whose identities can  
2 easily be ascertained from Defendant's employment and payroll records.

3           14.     **Common Questions Predominate:** Common questions of law and fact exist as to  
4 all Class Members, and predominate over any questions that affect only individual Class Members.  
5 The common questions of law and fact include, but are not limited to:

6                   a.     What were Defendant's policies and/or practices for paying overtime  
7 compensation for overtime work?

8                   b.     Did Defendant have and implement a policy and/or practice whereby  
9 Defendant required the Class Members to work off-the-clock, i.e. while their work time was not  
10 being recorded?

11                  c.     Did Defendant have and implement a policy and/or practice whereby  
12 Defendant failed to maintain records of the Class Members' regular rate of pay for any week when  
13 overtime is worked, hours worked each workday and total hours worked each workweek, total daily  
14 or weekly straight-time earnings, and total overtime compensation for the workweek, as required  
15 by the FLSA?

16                  d.     What were Defendant's policies and/or practices for determining the regular  
17 rate of pay for purposes of calculation of overtime rates?

18                  e.     Did Defendant have and implement a policy and/or practice whereby  
19 Defendant failed to pay its hourly employees for overtime work at the legally required overtime  
20 rate, namely time and a half their regular rates?

21                  f.     Do Defendant's policies and/or practices with regard to overtime wages  
22 constitute or result in a violation of the FLSA?

23                  g.     Do Defendant's policies and/or practices with regard to overtime wages  
24 constitute or result in unfair business practices by Defendant within the meaning of the California  
25 Unfair Competition Law, California Busn. & Prof. Code sections 17200, *et seq*?

26                  h.     Is Defendant liable to the Class Members for restitution and/or injunctive  
27 relief under the California Unfair Competition Law, California Busn. & Prof. Code section 17203?  
28

1 i. Did Defendant have and implement a policy and/or practice whereby  
2 Defendant failed to timely pay all overtime wages due at time of termination?

3 j. Are Plaintiff and Class Members entitled to injunctive relief under 29 U.S.C.  
4 § 216(a).

5 k. Are Plaintiff and Class Members entitled to injunctive relief regarding  
6 Defendant's failure to maintain records of the Class Members' regular rate of pay for any week  
7 when overtime is worked, hours worked each workday and total hours worked each workweek,  
8 total daily or weekly straight-time earnings, and total overtime compensation for the workweek?

9 15. **Typicality:** Plaintiff's claims are typical of, or the same as, the claims of the Class  
10 Members. Plaintiff and other Class Members sustained losses, injuries and damages arising out of  
11 Defendant's common policies and/or practices and violations of law referred to in each claim for  
12 relief, which were applied to the other Class Members and Plaintiff. Plaintiff seeks recovery for the  
13 same types of losses, injuries, and damages as were suffered by the other Class Members.

14 16. **Adequacy:** Plaintiff is able fairly and adequately to protect the interests of all Class  
15 Members. The attorneys for Plaintiff and the prospective Class are qualified, competent and very  
16 experienced in class action litigation, particularly class actions for violations of laws governing  
17 wages and hours. Plaintiff is not disqualified by any interests antagonistic to the remainder of the  
18 Class.

19 17. **Superiority:** A class action is superior to other available means for the fair and  
20 efficient adjudication of this controversy. Individual joinder of all Class Members is impractical.  
21 Class action treatment will permit a large number of similarly situated persons to prosecute their  
22 common claims in a single forum simultaneously, efficiently, and without the unnecessary  
23 duplication of effort and expense that numerous individual actions engender. Also, because the  
24 losses, injuries and damages suffered by each of the individual Class Members are small in the  
25 sense pertinent to class action analysis, the expenses and burden of individual litigation would  
26 make it extremely difficult or impossible for the individual Class Members to redress the wrongs  
27 done to them. On the other hand, important public interests will be served by addressing the matter  
28 as a class action. The cost to the court system and the public of adjudication of individual litigation

1 and claims would be very substantial, and substantially more than if the claims are treated as a class  
2 action. Individual litigation and claims would also present the potential for inconsistent or  
3 contradictory results. The issues in this action can be decided by means of common, classwide  
4 proof. In addition, if appropriate, the court can, and is empowered to, fashion methods to  
5 efficiently manage this action as a class action.

6       18.     **Public Policy Considerations:** Defendant and other employers throughout  
7 California violate wage and hour laws. Their current employees are often afraid to assert their  
8 rights out of fear of direct or indirect retaliation. Their former employees are fearful of bringing  
9 claims because doing so can harm their employment and future efforts to secure employment.  
10 Class actions provide Class Members who are not named in the complaint a degree of anonymity  
11 that allows for vindication of their rights while reducing these risks.

12       19.     During the period of time applicable to this claim for relief, Plaintiff and the other  
13 Class Members very frequently worked, and other Class Members continue to work, more than  
14 forty (40) hours per workweek.

15       20.     During the period of time applicable to this claim for relief, Defendant did not pay  
16 Plaintiff or the other Class Members and continues to not pay other currently employed Class  
17 Members at the required overtime rates for the work described in the preceding paragraph, and  
18 frequently failed to pay them at all for their overtime hours.

19       21.     During the period of time applicable to this claim for relief, Defendant did not  
20 maintain records of the Class Members' regular rate of pay for any week when overtime is worked,  
21 hours worked each workday and total hours worked each workweek, total daily or weekly straight-  
22 time earnings, and total overtime compensation for the workweek.

23       22.     During the period of time applicable to this claim for relief, Defendant did not  
24 timely pay compensation, including unpaid overtime pay at the proper rate for all hours worked, at  
25 time of termination of employment.

**FIRST CLAIM FOR RELIEF**  
**(FLSA Overtime Pay)**

23. Plaintiff incorporates paragraphs 1 through 22 by reference as if fully set forth.

24. Plaintiff brings this Claim for Relief, for violations of the FLSA, as a collective action pursuant to FLSA section 16(b), 29 U.S.C. section 216(b), on behalf of all persons similarly situated, referred to as Class Members, further specified as follows:

**FLSA Class Definition**

All persons who, on or after three years before the filing of this Action have been, are, or in the future will be, employed in California by Defendant in positions of loss control representative, loss control consultant, marketing representative, senior loss control representative, senior loss control consultant or senior marketing representative.

25. At all relevant times, Plaintiff and the other Class Members employed as loss control representatives, loss control consultants, marketing representatives, senior loss control representatives, senior loss control consultants or senior marketing representatives have been and are similarly situated. Among other things, they have had substantially similar working conditions, involving substantial work in the field, and pay provisions. At all relevant times, Plaintiff and the other Class Members are and have been subjected to Defendant's common policies and/or practices of willfully failing and refusing to pay them at the legally required overtime (time-and-a-half) rates for work in excess forty (40) hours per week, frequently not paying at all for the overtime hours and failing to maintain records of the Class Members' regular rate of pay for any week when overtime is worked, hours worked each workday and total hours worked each workweek, total daily or weekly straight-time earnings, and total overtime compensation for the workweek, as required by the FLSA. The claims of Plaintiff stated herein are similar to or the same as those of the other Class Members.

1           26.     This Claim for Relief is properly brought and maintained as a collective action  
2 pursuant to section 16(b) of the FLSA, 29 U.S.C. section 216(b). The Class Members are readily  
3 ascertainable. For purposes of notice and other purposes related to this action, their names and  
4 addresses are readily available from Defendant. Notice can be provided to the Class Members via  
5 first class mail to the address last known to Defendant.

6           27.     At all relevant times, Defendant has been, and continues to be, an “employer”  
7 engaged in “commerce” within the meaning of the FLSA. At all relevant times, Defendant has  
8 employed, and continues to employ, the Class Members as “employee[s]” within the meaning of  
9 the FLSA. At all relevant times, Defendant has had gross operating revenues of more than  
10 \$500,000. Defendant is not entitled to immunity under the Eleventh Amendment to the U.S.  
11 Constitution.

12           28.     During the relevant times, Plaintiff and the other Class Members regularly worked  
13 more than forty (40) hours per workweek, and other Class Members continue to do so.

14           29.     At all relevant times, Defendant has had, and continues to have, common policies  
15 and/or practices of willfully failing and refusing to pay the Class Members at time and a half their  
16 regular rates for work of more than forty (40) hours per week.

17           30.     At all relevant times, Defendant has had, and continues to have, common policies  
18 and/or practices of willfully failing and refusing to pay the Class Members anything at all for  
19 substantial amounts of overtime work, in whole or in part as a result of working off-the-clock.

20           31.     At all relevant times, Defendant has had, and continues to have, common policies  
21 and/or practices of willfully failing and refusing to maintain records of the Class Members’ regular  
22 rate of pay for any week when overtime is worked, hours worked each workday and total hours  
23 worked each workweek, total daily or weekly straight-time earnings, and total overtime  
24 compensation for the workweek.

25           32.     Defendant, by a policy and practice applicable to the class, suffered and permitted  
26 Plaintiff and the Class Members to work the overtime for which a remedy is sought herein, by the  
27 following actions and knowledge:  
28



1           a.       By increasing numerical expectations of Class Members including as regards  
2 number of clients visited, and concurrently decreasing support staff;

3           b.       By using reports, such as the Loss Control Weekly Reports and/or Loss  
4 Control Representative Activity Log, that it knew did not contain information as to all hours  
5 worked;

6           c.       By having actual knowledge that Class Members worked in excess of forty  
7 hours per week, as reflected by company records routinely seen or available to supervisors,  
8 including but not limited to, emails copied to supervisors showing the date and time of the email,  
9 mobile phone bills for the mobile phone numbers uniquely assigned to Class Members showing  
10 dates and times of business phone calls, records showing the upload of reports to Defendant's  
11 "LCAM System", and log in and log out records on personal and/or Defendant's laptops; and

12           d.       Class Member complaints to the employer they could not handle the  
13 increased workload within a 40 hour workweek, which complaints were sometimes responded to by  
14 management with a threat of termination or other disciplinary action if the Class Member did not  
15 complete all of his or her work.

16       33.       Plaintiff worked an estimated amount of at least 23 hours of overtime in 2011, 129  
17 hours in 2012, 89 hours in 2013, and 11 hours in 2014, for which he has not been compensated at  
18 the statutory overtime rate. His total overtime pay claim, reflecting premium pay from 2011 to June  
19 30, 2013 of \$45.42 per hour, and from July 1, 2013 through 2014 of \$46.75 per hour, is  
20 approximately \$11,522.00.

21       34.       Plaintiff will seek leave of court to amend according to proof at time of trial to state  
22 the amount of overtime hours and pay when same is fully ascertained.

23       35.       Plaintiff and the other Class Members are entitled to be paid the unpaid FLSA  
24 overtime pay.

25       36.       Defendant's failure to pay wages as alleged in this claim for relief was and continues  
26 to be willful within the meaning of the FLSA. Plaintiff and the other Class Members are entitled to  
27 an additional equal amount of liquidated damages as provided by the FLSA for the overtime pay  
28 violations alleged herein.

37. Plaintiff, on behalf of himself and similarly situated loss control representatives, loss control consultants, marketing representatives, senior loss control representatives, senior loss control consultants and senior marketing representatives, requests relief as described below.

**SECOND CLAIM FOR RELIEF**

**(F.R.Civ.P. Rule 23 Class Action Claim for Relief for Violation of the California Unfair Competition Law, Business and Professions Code sections 17200, *et seq.*)**

38. Plaintiff incorporates paragraphs 1 through 37 by reference as if fully set forth.

39. The conduct of Defendant alleged above constitutes unlawful and unfair business practices and therefore unfair competition within the meaning of the California Unfair Competition Law, California Business and Professions Code sections 17200, *et seq.*, because the conduct is in violation of law, and because it is unfair and fraudulent within the meaning of the Unfair Competition Law.

40. As a result of Defendant's unfair competition as alleged herein, Plaintiff and the other Class Members suffered injury in fact and lost money and property. Plaintiff and the other Class Members have not been paid the money owed to them as alleged above, and Defendant has retained the money.

41. Pursuant to California Business and Professions Code section 17203, Plaintiff and the other Class Members are entitled to restitution of all said money, and interest thereon, that Defendant failed to pay them and wrongfully retained.

42. Enforcement of statutory provisions enacted to protect workers and to ensure proper, prompt payment of wages due to employees is a fundamental public interest in California. Consequently, Plaintiff's success in this action will result in enforcement of important rights affecting the public interest and will confer a significant benefit upon the public. Private enforcement of the rights enumerated herein is necessary, as no public agency has pursued enforcement.

43. If Plaintiff succeeds in enforcing these rights affecting the public interest, then Plaintiff is entitled to an award of attorney's fees against Defendant under California Code of Civil Procedure section 1021.5 because:

1 a. A successful outcome in this action will result in enforcement of important  
2 rights affecting the public interest by requiring Defendant to comply with wage and hour laws and  
3 California's unfair business practice law;

4 b. This action will result in a significant benefit to Plaintiff, Class Members,  
5 and the general public by bringing to a halt unlawful, unfair, deceptive, and misleading activity and  
6 by causing the return of ill-gotten gains obtained by Defendant;

7 c. Unless this action is prosecuted, Class Members will not recover those  
8 monies, and many of Defendant's employees would not be aware that they were victimized by  
9 Defendant's wrongful acts and practices;

10 d. Unless this action is prosecuted, Defendant will continue to mislead  
11 employees about the true nature of their rights and remedies under the wage and hour laws; and

12 e. An award of attorney's fees is necessary for the prosecution of this action  
13 and will result in a benefit to Plaintiff, Class Members, and to consumers in general by preventing  
14 Defendant from continuing to circumvent the wage and hour laws, which are matters of public  
15 concern, designed to provide minimum guarantees to workers, and are essential to public welfare.

16 44. Plaintiff, on behalf of himself and similarly situated loss control representatives, loss  
17 control consultants, marketing representatives, senior loss control representatives, senior loss  
18 control consultants and senior marketing representatives, requests relief as described below.

19 **THIRD CLAIM FOR RELIEF**  
20 **(Waiting Time Penalties)**  
**(Labor Code Sections 201, 202, & 203)**

21 45. Plaintiff incorporates paragraphs 1 through 44 by reference as if fully set forth.

22 46. California Labor Code section 201 requires an employer who discharges a  
23 California employee to pay all compensation due and owing to that employee immediately upon  
24 discharge.

25 47. California Labor Code section 202 requires an employer to pay all compensation  
26 due and owing to a California employee who quits within 72 hours of that employee's quitting,  
27 unless the employee provides at least 72 hours' notice of quitting, in which case all compensation  
28 is due at the end of the employee's final day of work.

48. California Labor Code section 203 provides that if an employer willfully fails to pay compensation promptly upon discharge or quitting, as required by section 201 or section 202, then the employer is liable for waiting time penalties in the form of continued compensation of up to 30 work days. The specific amount owing for penalties as to Plaintiff individually is approximately \$7,479.00.

49. Defendant willfully failed and refused to timely pay compensation and wages, including unpaid overtime pay at the proper rate for all hours worked, to Plaintiff and similarly situated loss control representatives, loss control consultants, marketing representatives, senior loss control representatives, senior loss control consultants and senior marketing representatives, at time of discharge or quitting. As a result, Defendant is liable to Plaintiff and similarly situated loss control representatives, loss control consultants, marketing representatives, senior loss control representatives, senior loss control consultants and senior marketing representatives for waiting time penalties under California Labor Code section 203.

50. Plaintiff, on behalf of himself and similarly situated loss control representatives, loss control consultants, marketing representatives, senior loss control representatives, senior loss control consultants and senior marketing representatives, requests relief as described below.

### **PRAYER**

WHEREFORE, Plaintiff prays for judgment against Defendant for himself and all others on whose behalf this suit is brought as follows:

A. For such general, special and liquidated damages and penalties as may be appropriate, including all damages and penalties alleged above.

B. For unpaid wages at overtime rates for all overtime work required by the FLSA.

C. For permanent injunctive relief under 29 U.S.C. section 216(a) enjoining Defendant's policies and/or practices of failing and refusing to pay Class Members at the legally required overtime (time-and-a-half) rates for work in excess forty (40) hours per week.

D. For restitution as described in the claim for relief under California Business & Prof. Code sections 17200, *et seq.*, above.

1 E. For permanent injunctive and declaratory relief described in the claim for relief  
2 under California Business & Prof. Code sections 17200, *et seq.*, above.

3 F. For permanent injunctive relief enjoining Defendant's policies and/or practices of  
4 failing and refusing to maintain records of the Class Members' regular rate of pay for any week  
5 when overtime is worked, hours worked each workday and total hours worked each workweek,  
6 total daily or weekly straight-time earnings, and total overtime compensation for the workweek,  
7 and enjoining Defendant's policies and/or practices of failing and refusing to pay all wages due at  
8 time of discharge or quitting.

9 G. For pre-judgment interest.

10 H. For costs of suit and an award of reasonable attorney's fees under the FLSA and  
11 California Code of Civil Procedure section 1021.5.

12 I. For such other relief as the Court deems just and proper.

13 Dated: November 5, 2014

LAW OFFICES OF SOHNEN & KELLY

14  
15 By: /s/ Harvey Sohn

HARVEY SOHNEN

16 Attorneys for Plaintiff PEDRO ACERO,  
17 individually, and on behalf of all others  
similarly situated

18 **DEMAND FOR JURY TRIAL**

19 Plaintiff demands trial by jury.

20 Dated: November 5, 2014

LAW OFFICES OF SOHNEN & KELLY

21  
22 By: /s/ Harvey Sohn

HARVEY SOHNEN

23 Attorneys for Plaintiff PEDRO ACERO,  
24 individually, and on behalf of all others  
25 similarly situated  
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